No. 2508

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THOMAS ANDREWS, alias Thomas J. Murphy, and GEORGE POOLE, alias George Moore,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

JOHN W. PRESTON,
United States Attorney,
Attorney for Defendant in Error.

Filed this.....day of March, 1915.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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STATEMENT.

The statement of facts on pages 2, 3, and 4 of the brief of plaintiffs in error is fairly accurate, and a further statement at length here would be unnecessary to the discussion of the law points urged.

ALLEGED DUPLICITY IN INDICTMENT.

Ignoring the defense that the advantage was not taken of the alleged duplicity in the indictment by demurrer, general or special or by motion, and also

without pausing to dwell upon the fact that permission to withdraw a plea in order to interpose a dilatory pleading or motion is a discretionary matter, we pass with confidence to the merits of the point urged.

It is claimed in substance that a conspiracy to unlawfully import opium can not co-exist with a conspiracy to receive and conceal after unlawful importation, and this is particularly true it is claimed, when the overt acts are the same.

It seems that a statement of the matter is sufficient for its refutation. It can not be denied:

1st. That importation is made a crime.

2nd. That receiving and concealing after importation, with knowledge of unlawful importation, is likewise a crime.

(Act of February 9, 1909.)

3rd. It is also plain and undisputed that a conspiracy to commit an offense is likewise an offense.

4th. It is certainly a fact that the two offenses are kindred and such as could be pleaded in separate counts in same indictment as required by Revised Statutes, section 1024.

Conceding the above, where is the duplicity?

What valid objection can be urged to testimony that would be admissible in proof of both offenses?

Why may not a person at the same time and place conspire to commit two crimes?

What valid objection can there be that the crimes are so closely related that proof of a conspiracy to commit one is proof also of a conspiracy to commit the other, or that the overt acts charged in one, are identical with the overt acts charged in the other?

If the overt acts are the same and the time and place of conspiracy the same, the only legitimate conclusion is that the counts are properly united and certainly duplicity is not to be inferred from this happy coincidence.

Counsel seems also to concede that if conspiracy to commit the one is coupled with the substantive charge as to the other it is a proper pleading. If this be true, why does he not thus concede the whole matter?

Section 37 of the Federal Penal Code is as follows:

> "Section 37. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both."

The opium statute of February 9, 1909, section 2 thereof, as it then existed, reads as follows:

> "Sec. 2. That if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any opium or any preparation or derivative thereof contrary to law, or shall receive, conceal, buy, sell,

or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited, and shall be destroyed, and the offender shall be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or by imprisonment for any time not exceeding two years, or both. Whenever, on trial for a violation of this section, the defendant is shown to have, or to have had, possession of such opium or preparation or derivative thereof, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possession to the satisfaction of the jury."

Section 1024 of the Revised Statutes reads as follows:

"Sec. 1024. When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated."

Conspiracy to commit an offense is denounced as a separate offense.

Clune v. United States, 159 U. S. 590; 40 L. Ed. 269.

So true is the above that a higher punishment may be imposed for the conspiracy than for the principal offense.

In McGregor v. United States, 134 Fed. 188, an indictment in fourteen counts is considered. The first two counts were conspiracies and the remainder were not. The two conspiracies covered practically, if not indentically, the same time, and all the overt acts, fourteen in number, of the first count, were made overt acts of the second count. The court in this case say at page 194:

> "The motion to quash the indictment for alleged duplicity is based on the fact that some of the counts charged that the defendants conspired to defraud the United States, and that other of the counts charged that the defendants, being officers and agents, or officers and clerks, violated sections 1781-1782 of the Revised Statutes by receiving money from their alleged co-conspirator, Smith, for procuring, or aiding to procure, a contract mentioned in the counts relating to the conspiracy. All of the offenses alleged in the different counts of the indictment were for acts connected together and bearing directly upon the conspiracy charged in the indictment, and consequently, under section 1024 of the Revised Statutes (U. S. Comp. St. 1901, p. 720), should have been united in the same indictment. Logan v. United States, 144 U. S. 263, 295, 12 Sup. Ct. 617, 36 L. Ed. 429.
>
> "The action of the court below in refusing to require the United States to elect under which counts of the indictment the trial should proceed was without error. The offenses charged were, as has been shown, directly connected together, and it was quite apparent to

> the trial judge that any evidence offered to sustain one count was also admissible and relevant to the other counts of the indictment. Such motions are addressed to the discretion of the court, and are not reviewable on writ of error. Pointer v. United States, 151 U. S. 396, 14 Sup. Ct. 410, 38 L. Ed. 208; Pierce v. United States, 160 U. S. 355, 16 Sup. Ct. 321, 40 L. Ed. 454."

INSTRUCTIONS.

Plaintiffs in error urge as the fifth ground for reversal the quotation from the charge of the court reciting the provisions of the opium act (Tr. pp. 193-240).

A portion of the charge not excepted to nor contained in the assignment of errors is also set out in the brief, which is as follows:

> "If you find that contraband opium was in the possession of the defendants or either of them, in pursuance of a conspiracy, that fact is sufficient to establish the overt act of having such opium in his possession unless explained by the defendant."

Now assuming that it is proper to consider both quotations, we are unable to see where the legitimate ground for criticism arises. The expression is certainly harmless; the overt act in each is that opium was transported in furtherance of the conspiracy, from El Paso, via Trinidad, Colorado, to San Francisco. Now, if opium was so found in the possession of defendants, it would certainly be proper for the court to say that such evidence is

sufficient proof of the overt act, and the further expression as follows:

> "The act further provides that whenever on trial for a violation of this section the defendant is shown to have, or to have had, possession of such opium or preparation or derivative thereof, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain possession to the satisfaction of the jury" (Tr. p. 193)

adds nothing to the case one way or the other. The recitation of a portion of the opium act was certainly proper and if not proper, certainly is harmless.

The law specially provides that on a trial for a violation of this section (importing, also concealing, etc.) possession is prima facie evidence of guilt.

Now, if it is prima facie evidence when on trial for the substantive offense, why should it not be prima facie evidence when conspiracy to commit the offense is the charge? Or, to state it differently, does it militate against a conspiracy charge to prove that conspiracy was in fact fully executed?

INSUFFICIENCY OF THE EVIDENCE.

In order that the length of the sentence be not considered for any purpose, it must be borne in mind that at the time these defendants were sentenced, it was admitted that these defendants had

each been previously convicted of smuggling opium (Tr. p. 204).

Taking up the evidence of defendants first, it will be noted that no explanation of the Government's testimony was offered or attempted. It will also be noted that the defendants themselves proved that George Poole, alias Moore, had been selling opium to witness Louie Sang, and that these operations began as early as 1909 and the last completed transaction was in about February, 1913 (Tr. p. 174). It is true that an attempt was made to impeach the statement of witness on the question of dates, but little comfort can be gained by defendants so long as it is admitted that the said defendant had at some time engaged in opium transaction with witness. Defendants also proved by the same witness (Tr. p. 174) that on the promise of Poole to buy him twelve cans, he had sent him in March, 1913, the sum of $300.00. This transaction is amplified in direct testimony of witness (Tr. pp. 116 to 124) wherein this same witness himself makes out a complete case of conspiracy, by testifying that for three or four years he had bought opium of both defendants and that from defendant Murphy, under the assumed name of Tom Walker, he received the letter shown on page 119 of the transcript which relates to importation and concealment of opium, and the George referred to therein is the defendant Poole.

The witness was to be known as George Sandees, and further, as heretofore pointed out, this witness

wired to defendant Poole at El Paso, Texas, through San Joaquin Valley Bank, two remittances for opium, one of $300 and one of $100. This letter suggests ways and means and promises a visit for the purpose of perfecting plans for carrying out the scheme. Note also the familiar terms upon which writer and witness are, and also the familiar references to witness about George, showing that witness was familiar with both defendants and also their business.

It seems to me that little, if any, further evidence should be sought for to prove the conspiracy itself. And if any of the overt acts are proved, this scheme would be in my opinion a clear case of conspiracy. But we have much more. We have these defendants, both living at and haunting El Paso and Juarez, Mexico, which places are separated only by the limits of the Rio Grande river (Tr. pp. 181, 186-187). We also find Poole getting from the bank at Nogales, Mexico, four cases of the value of $1000 each, of a substance known as "Amapol", which witnesses say was the name opium was known as in Mexico.

I submit that enough appears to warrant a jury in believing that this defendant was at that time about to import this opium into the United States. But whether this be sufficient, it is certainly corroborative to the other evidence that there was a conspiracy between the defendants to import and conceal opium (Tr. pp. 71-77, 136-7).

Again, the evidence is without doubt that both defendants were in San Francisco in July, 1913. Witness R. H. McCormick saw them together and also with a woman at Hotel Porter, 91 Turk Street, in July, 1913 (Tr. pp. 139-143).

In June, 1913, ~~Poole~~ Murphy was at Hotel Crellin, Oakland, under the assumed name of A. J. Spencer (Tr. p. 145) and prior to this time, to wit, on February 17, 1913, and November 18, 1912, he was likewise at this hotel under ~~some~~ same false name (Tr. pp. 145-6). Sunday, September 6, 1913, Poole registered at Hotel Porter (Tr. p. 147).

Both defendants were together in San Francisco in June, 1913, and were seen together by witness Maud Fay, at a restaurant, on the street, and in the Hotel Porter (Tr. p. 148).

On September 11, 1913, witness Marie Nelson saw defendant ~~Poole~~ Murphy sign the register at a hotel at 74 Turk street, under the false name of J. A. Spencer (Tr. pp. 107-109).

The letter of May 19, 1913, heretofore referred to, was addressed to San Francisco, and mentions a prospective trip to San Francisco in the immediate future.

Again, the testimony is clear that ~~Poole~~ Murphy on September 13, 1913, purchased a ticket and paid excess charges to the amount of $17.02 on two trunks from Trinidad, Colorado, to San Francisco, and that these trunks were Poole's trunks and that abundant

evidence remained of deposits of opium to show that opium had been a part of its contents.

The testimony is ample that these trunks were ~~Poole's~~ Murphy's; his keys fit the locks thereon, and that opium labels and bogus opium cans were found therein.

Further, that these trunks were carted about from hotel to hotel, and the circumstances warrant the belief that the black grip was used to take the opium out for sale and distribution.

Lastly, what was the defendant doing locked up with the Chinese at 30 Waverly Place on September 15, 1913; why deny ownership of the keys and papers conclusively shown to have been his property; why scatter them over the floor and throw them away? Why was he locked therein at all? What was the $1395 in bills for?

Of course it was a meeting to settle up an opium transaction.

Many other circumstances not necessary to dwell upon show beyond question, a gigantic conspiracy to perpetrate deliberate violations of the opium act. It is not surprising that the jury was so prompt in their verdict, and the court also swift in dealing out justice in this case. Total moral depravity of these defendants is absolutely clear.

I need not dwell further, except to say that counsel in his brief admits the overt act of purchasing the ticket and this, it would seem, is sufficient (Brief p. 17). But counsel argues that we do not

show formation of conspiracy in May, 1913. This of course is unnecessary so long as the conspiracy was within the Statute of Limitations and before the return of the indictment.

It is next insisted that because no direct evidence appears as to what defendant Poole did with the four cases of opium received at Nogales, and delivered as per instructions from Bank of Juarez, that this fact is fatal to a conviction on the first count.

How does such a conclusion follow?

Under a conspiracy charge it is not even necessary to prove that a single tin of opium was ever bought or sold. Suppose it be admitted that these cans were retaken from the border of the United States to the interior of Mexico, that fact would not render the evidence insufficient.

In other words, without an actual importation of this particular opium, sufficient evidence remains for a conviction.

The facts in this connection are however, that this opium was purchased through the Bank of Juarez, and shipped from the Port of Manzanillo to Nogales and it is not reasonable to suppose that the goods were again sent to the interior of Mexico, unless to evade detection. The purpose without doubt was to enter the goods for consumption in the United States (Tr. p. 75).

But counsel say that possession of this opium was the only support the charge of the court had in

reference to possession, and therefore the instruction was unwarranted.

I have already called attention to the fact that this portion of the charge was not excepted to nor is it in the assignment of errors.

Moreover, the facts proved in regard to the Nogales opium were a sufficient foundation for the charge in our opinion. Further, the proof in regard to the trunks at all times in his possession, was sufficient to show that with the knowledge of defendant Poole, the trunks had contained and did in fact contain deposits of opium.

It is, we take it, unnecessary to answer counsel's contention that possession not having been shown in the United States of the four cases of Nogales opium, that the overt act predicated thereon, fails for the reason that the overt act of buying the ticket, etc., at Trinidad, is not disputed. So also is the overt act about moving the trunks.

We therefore leave this branch of the case with full confidence that the jury were warranted in their verdict under the evidence.

NEWLY DISCOVERED EVIDENCE.

It is contended that the affidavits presented (Tr. pp. 210-222) showed facts from which an abuse of discretion by the court below may be decided by this court as a matter of law.

First, no diligence whatever is shown and no reason whatever appears why this testimony was not produced at the trial, and no assurance is given that it could at any time be produced. But we think the facts, if admitted in evidence, could not have changed the result. The affidavits of Geo. G. Sauer, a resident of El Paso, and Paulino Fontes, are to the effect that the cases of opium were shipped by Poole to Cananea, Mexico, but the affidavits nowhere state whose opium this was, nor who paid for it, nor what became of it, nor whether it was imported after reaching Cananea, to the United States.

It would seem that common fairness to the court would have required that some showing be made to the court as to what these packages were, what the defendants' connection with them was, and what became of them.

The affidavit of Louise Lorraine was simply cumulative to testimony at the trial that witness Louis Sang stated to defendant's attorney that his purchases of opium from defendants had not obtained since the year 1909.

The other affidavits are that defendant in the opinion of affiants, was not out of El Paso, Texas, during December, 1912, and January and February, 1913.

How this, if it were a fact, can affect the situation, we cannot see. But if it could, it is common knowledge that an alibi covering three months

could not with any certainty be testified to by a witness unless the parties were tied or handcuffed together.

RULINGS ON ADMISSION OF EVIDENCE.

Counsel cite no authorities under this head and make no argument not embraced in their argument as to sufficiency of evidence to convict.

We think the rulings set forth are so manifestly correct that to consume further time is unnecessary.

MOTION TO ACQUIT AND MOTION IN ARREST OF JUDGMENT.

If the evidence be sufficient to convict and if the affidavits of newly discovered evidence do not show an abuse of discretion on the part of the court, it is unnecessary to further discuss these topics.

CONCLUSION.

It is offenders of the kind the defendants are shown to be that should receive the swiftest and most severe punishment.

These men are guilty and the conviction was in our opinion without substantial or any error in the proceedings and we submit that cause ought to be affirmed.

Dated, San Francisco,
March 15, 1915.

JOHN W. PRESTON,
United States Attorney,
Attorney for Defendant in Error.